No. 80-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. SPENCER, INDIVIDUALLY AND d/b/a IRVING EQUIPMENT AND CONSTRUCTION COMPANY,

Petitioner,

VS.

HOWE RICHARDSON SCALE COMPANY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NUMBER BELOW: 80-1118

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IN THE

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HOWE RICHARDSON SCALE COMPANY,

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NUMBER BELOW: 80-1118

STATEMENT OF CASE

Proceedings and Dispositions Below

This action was commenced by Howe Richardson Scale Company ("Respondent" or "Howe Richardson"), on September 12, 1977. Over five months later, on February 22, 1978, Howe Richardson filed its Motion for Entry of

Default Judgment against William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company ("Petitioner" or "Irving Equipment") based on Irving Equipment's failure to appear in the action (Resp. A., App. A).[1] On February 23, 1978, the District Clerk for the Northern District of Texas filed its Entry of Default (Resp. A., App. C). A Motion for Default Judgment was filed by Howe Richardson on February 24, 1978 (Resp. A., App. D), and on March 2, 1978, the District Court entered an Order setting the case for hearings as to damages for March 21, 1978 (Pet. A-2). After hearing, the District Court entered Final Judgment of default in favor of Howe Richardson on March 22, 1978 (Pet. A-3).

Irving Equipment filed its Motion to Set Aside Final Judgment on April 17, 1978. (Resp. A., App. E). After a hearing, held on May 16, 1978, the District Court entered its Order refusing to set the judgment aside. (Pet. A-4). Irving Equipment appealed to the United States Court of Appeals for the Fifth Circuit, which summarily denied the appeal on August 25, 1980. (Pet. A-14). A motion for rehearing was denied by the Court of Appeals on October 15, 1980. (Pet. A-15).

Statement of Facts.

On July 14, 1977, Howe Richardson wrote a letter to Irving Equipment making formal demand for payment based on the breach of two construction contracts entered into between the parties. Correspondence was exchanged with respect to Howe Richardson's claims, but the parties were able to reach no settlement agreement. On September 12, 1977, Howe Richardson determined that Irving Equipment was not interested in settlement and instituted suit.

[1]Citations to Petitioner's appendix will be denoted by the abbreviation "Pet.", and those to Respondent's appendix by "Resp."

Irving Equipment responded to the service of summons by corresponding further with Howe Richardson and making additional inquiries with respect to the amount owed. (Pet. A-21). Howe Richardson complied with the requests made by Irving Equipment. On October 17, 1977, Howe Richardson informed Irving Equipment, by certified mail received on October 18, 1977, that Irving Equipment was in default since it had filed no answer to Howe Richardson's and that default proceedings would be instituted unless Howe Richardsons received a response from Irving Equipment within three days. (Resp. A, App. F). On November 1, 1977, fifteen days from the date of the October 17 letter, Irving Equipment wrote Howe Richardson disputing the amount due and owing and requesting further information. (Pet. A-24). No settlement offer was ever made nor was an answer ever filed.

On February 1, 1978, Howe Richardson again corresponded with Irving Equipment advising it that if an answer was not filed or a firm offer of compromise made within five days of receipt of that letter, Howe Richardson would institute default proceedings and request a hearing for a default judgment. (Resp. A, App. G). This letter was returned to Howe Richardson's counsel marked "Unclaimed".

On February 22, 1978, Howe Richardson mailed to Irving Equipment a copy of its Motion for Entry of Default Judgment, which was filed that day (Resp. A, App. A and App. H). Two days later, on February 24, Howe Richardson mailed a copy of its Motion for Default Judgment (Resp. A, App. P and App. I), which was filed on that date, and to which was attached the Clerk's Entry of Default, which was filed and entered on February 23, (Resp. A, App. C). Neither of these letters was returned to Howe Richardson.

On March 6, 1978, Howe Richardson mailed to Irving

Equipment, by certified mail, a letter with a copy of the District Court's Order granting Howe Richardson's Motion for Default Judgment and setting a hearing on damages for March 21. Irving Equipment picked up the March 6 letter on the afternoon of March 21; the next day the District Court entered its judgment. On April 17, 1978, Irving Equipment filed its Motion to Set Aside Final Judgment.

A hearing on Irving Equipment's Motion to Set Aside Judgment was held on May 16, 1978, and on January 4, 1980 the District Court entered its Order denying the Motion (Pet. A-5). It is undisputed, and the District Court so found, that at all relevant times herein, Irving Equipment's mailing address was 1905 South Stone, Irving, Texas and that all correspondence to and service on Irving Equipment by Howe Richardson was to that address. (Pet. A-7).

REASONS FOR DENYING THE WRIT

There is No Reason For Invoking This Court's Discretionary Jurisdiction

The petition for writ of certiorari filed on behalf of William Spencer, individually and d/b/a Irving Equipment and Construction Company, presents no issue requiring the exercise of this Court's discretionary jurisdiction. Petitioner has wholly failed to make any showing of "special and important reasons" for invoking this Court's discretion. Supreme Court Rule 19. The legal standards governing default judgment are well established and have not been challenged by Petitioner. Petitioner's complaint is based

upon the particular, narrow facts of this case, and not upon any legal or factual circumstances having general application. Moreover, not only is the sole issue one which does not merit this Court's attention, but the lower courts correctly decided the issues presented. Respondent would respectfully urge that the Petition be summarily denied.

Petitioner's contention in this case is that the District Court erred in denying its Motion to Set Aside a Default Judgment under Rule 60(b) of the Federal Rules of Civil Procedure. As Petitioner concedes, the proper standard of review is simply whether the District Court abused its discretion in denying the Motion. *Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257, 263 n. 7, 54 L. Ed. 2d 521, 98 S. Ct. 556, *rehearing denied,* 434 U.S. 1089, 55 L. Ed. 2d 795, 98 S. Ct. 1286 (1978). As this Court has recognized, "the trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b).' " *Standard Oil of California v. United States,* 429 U.S. 17, 19, 50 L. Ed. 2d, 21, 97 S. Ct. 31 (1976), *quoting from Wilkin v. Sunbeam Corp.,* 405 F.2d 165, 166 (10th Cir. 1968). The District Court's exercise of discretion, in which the Court of Appeals concurred, should not be disturbed.

Proper Notice Was Given

Petitioner errs in stating that written notice of the default proceedings was never served. On February 22, 1978, Howe Richardson deposited a copy of its Motion for Entry of Default Judgment in the United States mail. On February 24, 1978, Howe Richardson deposited a copy of its Motion for Default Judgment in the United States mail. Under the

rules of procedure, service of such documents was complete upon mailing. Fed. R. Civ. P. 5(b).

Petitioner's argument as to lack of written notice of the application for default judgment rests on its contention that it did not receive the letters and motions sent to it on February 22 and 24. When asked directly whether it had received these documents, the best William Spencer, petitioner's principal, was able to say was that he didn't "recall" getting them; he could not unequivocally state that he did not receive them personally, nor did he produce any evidence that other members of his family did not receive them. Simply stated, the District Court declined to believe that two separate mailings had not reached their destination, despite having been properly addressed and mailed.

Moreover, Howe Richardson mailed two other letters to Irving Equipment during February and March which would have alerted it to the default proceedings had Irving Equipment not totally neglected to pick up the certified letters, despite repeated notices from the post office. The first letter was dated February 1, 1978, in which Howe Richardson's counsel specifically advised Irving Equipment, for the second time, that it was in default and that a judgment would be entered if it did not file an answer. This letter was returned unclaimed. Subsequently, Irving Equipment did not pick up the March 6 certified letter advising it of the hearing on damages until March 21, after the hearing had been held. Irving Equipment had received two prior notices from the postal service of attempted delivery of this notice.

Petitioner's Neglect Was Not Excusable

The record reflects a continuing pattern of neglect by Petitioner, rather than a single instance of neglect. Had Petitioner heeded even one of the four letters mailed to it between February 1 and March 6, it would have been in a position to prevent the default judgment. On this state of facts, coupled with Howe Richardson's prior notice to Irving Equipment that it was in default, the District Court was amply justified in determining that Irving Equipment's neglect was not excusable. Petitioner had also ignored Respondent's letter of October 17, informing Irving Equipment that it was in default and subject to having judgment entered against it.

Howe Richardson's counsel did not seek to acquire a judgment by stealth. Rather, Howe Richardson patiently waited on Irving Equipment to file a formal answer. Having waited for several months and being confronted with Irving Equipment's failure to claim the February 1 certified letter, Howe Richardson properly instituted default proceedings and the District Court properly granted relief. There was no abuse of discretion in refusing to set aside the default judgment. *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975) (per curiam).

Petitioner Failed to Show a Meritorious Defense

In its Motion to Set Aside Final Judgment, Irving Equipment presented no assertion, either factually or conclusory, that it had a meritorious defense. Resp. A, App. E). At the hearing on the Motion to Set Aside, Irving Equipment presented no facts setting forth a meritorius defense.

The cases cited by Petitioner clearly recognize that mere

conclusions are insufficient to set forth a meritorius defense; the movant is required to set out clear and specific facts relating to his defense. *Moldwood Corp. v. Stutts,* 410 F.2d 351, 352 (5th Cir. 1969); *see United Artists Corp. v. Freeman,* 605 F.2d, 854, 857 n.4 (5th Cir. 1979). In fact, Petitioner's only real objection was to the amount of damages, not the existence of liability. At the hearing on the motion to set aside, counsel for the Petitioner stated:

> We do not contend that the whole thing should be thrown out of Court and start all over again, but on the issue of damages, yes. . . .

However, Irving Equipment did not adduce any facts pertaining to any amounts of damages other than those awarded. Furthermore, the record is clear that with even minimal diligence, Irving Equipment could have appeared at the March 21 hearing and contested the issue of damages. Having failed to do so, and having failed to produce any evidence on damages at the hearing on the motion to set aside, the District Court properly exercised its discretion in denying Defendant any relief, an exercise in which the Fifth Circuit summarily concurred.

CONCLUSION

The Petition fails to set forth any basis for invoking this Court's extraordinary certiorari jurisdiction, nor does it demonstrate any error in the decisions below. Therefore, Respondent respectfully requests that the Petition be denied at Petitioner's cost.

Respectfully submitted,

STEVEN R. McCOWN
CHARLES L. PERRY
Seay, Gwinn, Crawford, Mebus
& Blakeney
4245 First International Bldg.
Dallas, Texas 75270
(214) 742-5191
Attorneys for Respondent

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY	:	
VS.	:	CIVIL ACTION
WILLIAM H. SPENCER, Individually and d/b/a IRVING EQUIPMENT & CONSTRUCTION COMPANY	:	3-77-1239-D

MOTION FOR ENTRY OF DEFAULT JUDGMENT

TO the Clerk of the United States District Court for the Northern District of Texas, Dallas Division:

Upon the Affidavit attached hereto, you will please enter notice of default against William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company, defendant in the above entitled action.

Respectfully submitted,

CLARK, WEST, KELLER,
SANDERS & BUTLER
Barefoot Sanders
Steven R. McCown

By /s/ Steven R. McCown

2424 First National Bank Building
Dallas, Texas 75202 741 1001

Attorneys for Plaintiff
HOWE RICHARDSON SCALE
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon defendant by placing a copy of same in the United States mail, postage prepaid, addressed to William H. Spencer, Irving Equipment & Construction Co., 1905 Southstone, Irving, Texas 75060 this 22 day of February, 1978.

/s/ Steven R. McCown

Motion for Entry
of Default Judgment - Page Solo

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY	:	
VS.	:	CIVIL ACTION
WILLIAM H. SPENCER, Individually and d/b/a IRVING EQUIPMENT & CONSTRUCTION COMPANY	:	3-77-1239-D

AFFIDAVIT FOR DEFAULT JUDGMENT

STATE OF TEXAS)
COUNTY OF DALLAS)

Steven R. McCown, being duly sworn, says that he is attorney for plaintiff in the above entitled action; that the amount due plaintiff from defedant is $34,110.23 as more fully appears from the complaint filed in this proceeding; that based upon information and belief the defendant is not an infant or incompetent person; that the default of the defendant has been entered for failure to appear in the action; that the amount shown by the statement is justly due and owing and that no part thereof has been paid; that the disbursements sought to be taxed have been made in this

action or will necessarily be made or incurred therein; and that the defendant is not in the military service of the United States.

/s/ Steven R. McCown

STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Steven R. McCown, who on his oath stated to me that he is one of the attorneys for Howe Richardson Scale Company, that he prepared the foregoing Affidavit for Default Judgment and that to the best of his knowledge and belief the same is in all things true and correct.

/s/ Steven R. McCown

SWORN TO AND SUBSCRIBED before me this ____ day of February, 1978.

/s/ Notary Public in and for Dallas County, Texas

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY	:	
VS.	:	CIVIL ACTION
WILLIAM H. SPENCER, Individually and d/b/a IRVING EQUIPMENT & CONSTRUCTION COMPANY	:	3-77-1239-D

CLERK'S ENTRY OF DEFAULT

Plaintiff Howe Richardson Scale Company has requested that a Notice of Default be entered against defendant William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company.

Plaintiff's complaint was filed on September 12, 1977. Personal service upon defendant was made by Deputy United States Marshal on September 16, 1977.

Defendant, up and through the date shown below, has failed to plead, answer, otherwise defend or appear in this action; it is hereby

ORDERED, that Notice of Default against defendant

William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company in favor of plaintiff Howe Richardson Scale Company be entered.

JOSEPH McELROY, JR., Clerk
United States District Court
Northern District of Texas

By /s/ Mary S. Ramos
Deputy Clerk

DATED: February 23, 1978

Clerk's Entry
of Default - Page Solo

EXHIBIT B

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY	:	
VS.	:	CIVIL ACTION
WILLIAM H. SPENCER, Individually and d/b/a IRVING EQUIPMENT & CONSTRUCTION COMPANY	:	3-77-1239-D

MOTION FOR DEFAULT JUDGMENT

Plaintiff Howe Richardson Scale Company, pursuant to Rule 55, *Fed. R. Civ. Proc.,* files this motion for default judgment and for grounds therefor would show the Court the following:

I.

Defendant William H. Spencer, Individually and d/b/a Irving Equipment & Construction Company, has failed to answer or otherwise defend as to the complaint of plaintiff, a copy of which is attached hereto as Exhibit A.

action or will necessarily be made or incurred therein; and that the defendant is not in the military service of the United States.

/s/ Steven R. McCown

STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared Steven R. McCown, who on his oath stated to me that he is one of the attorneys for Howe Richardson Scale Company, that he prepared the foregoing Affidavit for Default Judgment and that to the best of his knowledge and belief the same is in all things true and correct.

/s/ Steven R. McCown

SWORN TO AND SUBSCRIBED before me this ____ day of February, 1978.

/s/ Notary Public in and for Dallas County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon defendant by placing a copy of same in the United States mail, postage prepaid, addressed to William H. Spencer, Irving Equipment & Construction Co., 1905 Southstone, Irving Texas 75060 this 24th day of February, 1978.

/s/ Steven R. McCown

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWE RICHARDSON SCALE COMPANY	)(	
VS.	)(	
	)(	CA NO. 3-77-1239-D
WILLIAM H. SPENCER, Individually and d/b/a IRVING EQUIPMENT & CONSTRUCTION COMPANY	)(	

MOTION TO SET ASIDE FINAL JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES WILLIAM H. SPENCER, Defendant herein, and moves this Court to set aside the Final Judgment entered on March 22, 1978, and as grounds therefor would show the Court the following:

1. The complaint was filed against Defendant on September 12, 1977. Service of citation was obtained upon Defendant a short time thereafter.

2. In response to said service of citation, Defendant wrote a letter to Plaintiff's attorney on September 26, 1977. (See attached Exhibit "A".)

3. At the time of filing Plaintiff's complaint, negotiations

between Plaintiff's attorney and Defendant had been ongoing since July 14, 1977, at which time first contact was had between Defendant and Plaintiff's attorney.

4. Defendant did not receive notice of the Court's order setting a hearing on damages for March 21, 1978, at 9:00 A.M. until late that same afternoon, after the hearing had transpired.

5. First knowledge of this Final Judgment by default came to Defendant in the office of Plaintiff's attorney on April 3, 1978, when he was personally handed a copy of the Final Judgment.

6. At no time previous to the entry of the Final Judgment against Defendant was he represented by counsel.

7. Defendant's neglect in pursuing this action was not wilful or intentional. Defendant believed that he was properly handling the matter by negotiating with Plaintiff's attorney.

WHEREFORE, Defendant requests this Court to set aside and hold for naught the Final Judgment against him entered herein March 22, 1978.

Respectfully submitted,

McCORKLE, WESTERBURG
& FELTON

By: /s/ Tom S. McCorkle

Tom S. McCorkle
500 Katy Building
Dallas, Texas 75202
(214) 742-1411

ATTORNEYS FOR
DEFENDANT

APPENDIX F

October 17, 1977

Mr. W. G. Spencer
Irving Equipment & Construction Co.
1905 Southstone
Irving, Texas 75060

Re: Howe Richardson Scale Company v. William H. Spencer, individually and d/b/a Irving Equipment and Construction Company

Dear Mr. Spencer:

Dear Mr. Spencer:

Howe Richardson Scale Company informs me that all work reflected on C. R. Buddy Smith's invoices was required to correct faulty construction by you on the two jobs in question. The discrepancy in payment referred to by you in your September 12, 1977, letter is not a discrepancy at all. Please total the entire amount of all invoices submitted by Mr. Smith for both reconstructions and the results should equate to Howe Richardson's total payments.

With regard to your invoice §8649 and requested credit, Howe Richardson takes the position that your faulty construction was of no benefit to it or the customer and no credit should be allowed since your work had to be reperformed. Finally, with regard to verification of the Harris County Public Scales down charges, you can cer-

tainly understand that Howe Richardson does not have Harris County's cancelled checks. However, if you seriously wish to satisfy your obligations without resort to additional legal proceedings, we will be happy to attempt to obtain a copy of this check from Harris County.

Inasmuch as you have requested this additional information, Howe Richardson has postponed the institution of default proceedings against you. If no further response is received from you within three (3) days of receipt of this letter, Howe Richardson will proceed to institute the necessarry default proceedings.

Very truly yours,

CLARK, WEST, KELLER,
SANDERS & BUTLER

/s/ Steven R. McCown

SRMCC:JN
bcc: Mr. Jack McCormack

APPENDIX G

CERTIFIED MAIL #794789
RETURN RECEIPT REQUESTED

February 1, 1978

Mr. W. G. Spencer
Irving Equipment & Construction
1905 Southstone
Irving, Texas 75060

Re: Howe Richardson Scale Company v.
William G. Spencer, individually, and d/b/a
Irving Equipment and Construction Company

Dear Mr. Spencer:

In reply to your letter of November 1, 1977, please be advised that Howe Richardson Scale Company informs me that all work performed by C. R. Buddy Smith was required to correct your faulty construction at both jobs in question.

Additionally, Howe Richardson does not agree with your computation of any "discrepancies" in the invoice, nor does it agree with your position that you are due a credit on the Brownsville job. We are in the process of obtaining a copy of the settlement check in the Harris County Public Scale job and will forward you a copy upon receipt.

At this time we do not foresee any further information that you may need in evaluating your position. Since you have failed to file an answer in federal court as required by the Federal Rules of Civil Procedure, you leave us no choice but to request a hearing for a default judgment against you unless we hear from you concerning a firm offer of compromise in this case within five days of receipt of this letter.

Very truly yours,

CLARK, WEST, KELLER,
SANDERS & BUTLER

/s/ Steven R. McCown

SRM: ncj

bc: Mr. J. F. McCormack

APPENDIX H

February 22, 1978

Mr. William H. Spencer
Irving Equipment & Construction Co.
1905 Southstone
Irving, Texas 75060

Re: Howe Richardson Scale Company
vs. William H. Spencer,
Individually and d/b/a Irving Equipment &
Construction Company

Dear Mr. Spencer:

Enclosed please find a copy of a Motion for Entry of Default Judgment which we have filed with the court this date.

Very truly yours,

CLARK, WEST, KELLER,
SANDERS & BUTLER

/s/ Steven R. McCown

SRNCC:JN

Enclosure

bcc: Mr. J. F. McCormack w/enclosure
Howe Richardson Scale Company
680 Van Houten Avenue
Clifton, New Jersey 07015

APPENDIX I

February 24, 1978

Mr. William H. Spencer
Irving Equipment & Construction Co.
1905 Southstone
Irving, Texas 75060

Re: Howe Richardson Scale Company
vs. William H. Spencer,
Individually and d/b/a Irving Equipment &
Construction Company

Dear Mr. Spencer:

Enclosed please find a copy of a motion for default judgment which was filed in the above referenced cause today.

Very truly yours,

CLARK, WEST, KELLER,
SANDERS & BUTLER

/s/ Steven R. McCown

SRMCC:JN

Enclosure

bcc: Mr. J. F. McCormack w/enclosure
Howe Richardson Scale Company
680 Van Houten Avenue
Clifton, New Jersey 07015

APPENDIX J

March 6, 1978

CERTIFIED
RETURN RECEIPT REQUESTED

Mr. William H. Spencer
Irving Equipment & Construction Co.
1905 Southstone
Irving, Texas 75060

Re: Howe Richardson Scale Company
vs. William H. Spencer,
Individually and d/b/a Irving Equipment &
Construction Company

Dear Mr. Spencer:

Enclosed please find an order entered by U. S. District Judge Robert M. Hill granting Howe Richardson's motion for default judgment and setting a hearing on damages for March 21, 1978 at 9 a.m. at the United States Courthouse, 1100 Commerce Street, Dallas, Texas.

Very truly yours,

/s/ Stephen R. McCown